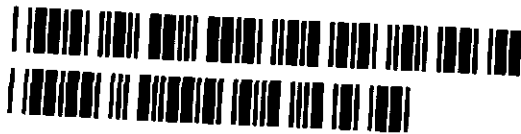


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10-CV-01917-ORD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT I. JOSEPH,

Plaintiff,

v.

ERIC K. SHINSEKI, et al.,

Defendant.

CASE NO. C10-01917-MJP

ORDER DISMISSING JOSEPH'S
QUI TAM ACTION AND UNSEALS
THE ACTION

This matter comes before the Court on Government's notice declining to intervene and suggesting dismissal (Dkt. No. 25.) Having reviewed the motion, the response (Dkt. No. 26), the reply (Dkt. No. 27), and all related filings, the Court DISMISSES the qui tam action against the VA and the Individual Defendants in their official capacity with prejudice, DENIES Joseph's request for investigation (Dkt. No. 26), and UNSEALS the action. The personal capacity claims against the Individual Defendants are DISMISSED without prejudice.

Background

Joseph is a former employee of the U.S. Department of Veterans Affairs ("VA") and challenges the VA's salary classification system. Based on his complaint, Joseph responded to a

1 job announcement from the VA advertising a GS-9 position with the possibility of attaining a
2 GS-12 salary after two years. (Compl. ¶¶ 1-2.) Joseph alleges he accepted the position but was
3 promoted only to GS-10. (Id. ¶ 5.) Joseph believes the VA failed to pay him in accordance with
4 Office of Personnel Management (“OPM”) guidelines. (Id.)

5 In November 2010, Joseph filed two separate actions arising from the alleged
6 misclassification. The first asserted claims on Joseph’s behalf (“Plaintiff’s Action”). In April,
7 2011, the Court granted Defendant’s motion to dismiss Plaintiff’s Action for lack of subject
8 matter jurisdiction. (Dkt. No. 22.) The second asserted claims as a relator on behalf of the
9 United States under the False Claims Act (“Qui Tam Action”). Plaintiff’s Qui Tam Action
10 asserts Fraud, False Claims Act, breach of contract, Racketeering Influenced and Corrupt
11 Organizations Act (“RICO”), embezzlement and conversion claims.

12 Discussion

13 A. Dismissal of a Qui Tam Action

14 The False Claims Act permits a private person, referred to as a relator, to bring a civil
15 action on behalf of the federal government against an individual or corporation for knowingly
16 presenting false claims to the government. 31 U.S.C. § 3730(b). To proceed with the qui tam
17 action, the relator must provide a copy of the complaint to the government sixty days before the
18 complaint is served on the defendant. See 31 U.S.C. § 3730(b)(2). This period allows the
19 government to investigate the relator’s claims and determine whether it will either elect or
20 decline to intervene. 31 U.S.C. § 3730(b)(2)(4).

21 In declining to intervene, the government may move to dismiss a qui tam action when it
22 believes a case has no merit. 31 U.S.C. § 3730(c)(2)(a); see United States ex rel. Kelly v. Boeing
23 Co., 9 F.3d 743, 753 (9th Cir. 1993) (citing Juliano v. Fed. Asset Disposition Ass’n, 736 F.Supp.

1 348 (D.D.C.), aff'd, 949 F.2d 1101 (D.C. Cir. 1992)). The government may dismiss the action
2 "notwithstanding the objections of the person initiating the action if the person has been notified
3 by the Government of the filing of the motion and the court has provided the person with an
4 opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A).

5 Here, the government suggests the Court dismiss Joseph's qui tam action based on two
6 grounds: (1) lack of subject matter jurisdiction; and (2) sovereign immunity. The Court agrees.

7 i. Lack of subject matter jurisdiction

8 Joseph's qui tam action against the United States, the VA, and the Individual Defendants
9 in their official capacity lacks subject matter jurisdiction because it presents no justiciable case or
10 controversy, as required by Article III of the United States Constitution. See Sec'y of State Md.
11 v. Joseph H. Munson Co., 467 U.S. 947, 955 n.4 (1984). In a qui tam action, the United States is
12 the real party of interest, even if it permits a relator to pursue the action on its behalf. See Stoner
13 v. Santa Clara Cnty. Office of Educ., 502 F.3d 1116, 1126 (9th Cir. 2007) (citing In re
14 Schimmels, 127 F.3d 875, 882 (9th Cir. 1997)). A suit against a federal agency is considered an
15 action against the United States if "the judgment sought would expend itself on the public
16 treasure or domain, or interfere with the public administration." Dugan v. Rank, 372 U.S. 609,
17 620 (1963) (citing Land v. Dollar, 330 U.S. 731, 738 (1947)). Without an actual case or
18 controversy, the claim should be dismissed for a lack of subject matter jurisdiction. See
19 Ruvalcaba v. City of Los Angeles, 167 F.3d 514, 520-21 (9th Cir. 1999).

20 Here, Joseph's qui tam action brings charges against an individual or corporation for
21 knowingly presenting false claims to the government. Since Joseph is suing the United States,
22 the Plaintiff and Defendant are the same and any judgment would be paid out of the federal
23 treasury back to the federal treasury. Courts only adjudicate justiciable controversies. Because
24

1 Joseph's qui tam action presents no case or controversy, the Court DISMISSES the qui tam
2 action for a lack of subject matter jurisdiction.

3 ii. Sovereign immunity

4 Alternatively, the Court finds Joseph's claims barred by sovereign immunity. Joseph is
5 suing the Individual Defendants in both their official and personal capacities.

6 a. Official capacity

7 A suit against an agency or an officer of the United States in his or her official capacity is
8 considered an action against the United States. Balser v. Dep't of Justice, 327 F.3d 903, 907 (9th
9 Cir. 2003). The United States cannot be sued without express statutory authorization. N. Star
10 Alaska v. United States, 3 F.3d 1430, 1432 (9th Cir. 1993). A plaintiff bringing an action against
11 the United States must demonstrate an unequivocal waiver of immunity. See Graham v. Fed.
12 Emergency Mgmt. Agency, 149 F.3d 997, 1005 (9th Cir. 1998). Otherwise, a court lacks subject
13 matter jurisdiction over claims against the United States. Balser, 327 F.3d at 907.

14 Here, the False Claims Act allows relators to sue third parties for knowingly filing false
15 claims against the federal treasury but does not allow the United States to be sued. The United
16 States has not waived its sovereign immunity for False Claims Act claims. Joseph's claims
17 against the United States and the VA are barred by sovereign immunity. Since a plaintiff cannot
18 get around the bar by naming officers and individual employees, Joseph's claims against the
19 Individual Defendants in their official capacity are barred by sovereign immunity.

20 b. Personal capacity

21 In suggesting dismissal, the government believed Joseph's complaint sued the Individual
22 Defendants in their official capacity only. In his response, Joseph also asserts his claims against
23 the Individual Defendants in their personal capacity. (Dkt. No. 26.) Since Joseph's complaint
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1 did not provide notice of claims against the Individual Defendants in their personal capacity, the
2 Court DISMISSES the personal capacity claims against the Individual Defendants without
3 prejudice.

4 B. Request for Investigation

5 In his response, Joseph demands the government be ordered to investigate his claims.
6 The Court declines to do so. The False Claims Act confers broad discretion on the Attorney
7 General to determine which qui tam actions to pursue. Prosecutorial discretion allows the
8 government to decide whether it will investigate claims. United States ex rel., Sequoia Orange
9 Co. v. Baird-Neece Paking Corp., 151 F.3d 1139, 1143 (9th Cir. 1998). Since the government
10 has prosecutorial discretion, the Court DENIES Joseph's request to order an investigation.

11 C. The Qui Tam Seal

12 Under the False Claims Act, a qui tam complaint is filed under seal for at least sixty days,
13 at which point the government can move for an extension to investigate or decline to intervene.
14 31 U.S.C. § 3730(b)(2). The complaint can only be served on the defendant by court order. See
15 id.


16 Here, the Court sealed the entire case until the government determined whether it would
17 proceed with the action. (Dkt. No. 22 at 3.) Since the government declined to intervene and
18 decided the papers do not contain sensitive information, it does not object to unsealing the case if
19 the Court dismisses the case. The Court UNSEALS the action.

20 **Conclusion**

21 The Court DISMISSES the qui tam action on the basis of sovereign immunity and
22 qualified immunity with prejudice. Joseph's claims against the Individual Defendants in their
23 personal capacity are DISMISSED without prejudice. The Court UNSEALS the action.

1 The clerk is ordered to provide copies of this order to all counsel.

2 Dated this 26th day of July, 2011.

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5 Marsha J. Pechman
6 United States District Judge
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